EX PARTE OR LATE FILED

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7645

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174

November 7, 2001

RECEIVED

NOV 7 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: *Ex Parte* Presentation Regarding Joint Application by SBC Communications Inc. *et al.* for Provision of In-Region, InterLATA Services in Arkansas and Missouri
CC Docket No. 01-194

Florida Digital Network, Inc. ("FDN"), a Florida-based competitive local exchange carrier, submits this *ex parte* letter to address SBC's failure to satisfy its obligation under Section 251(c)(4) of the Telecommunications Act of 1996 (the "Act") to make available for resale the telecommunications portion of its retail DSL-based high-speed access service. FDN does not provide service in any SBC in-region state, and therefore has no direct interest in supporting or opposing SBC's Application. However, FDN is greatly concerned that any endorsement of SBC's flawed position regarding its DSL resale obligations would undermine FDN's ability to prosecute its right to obtain DSL at resale from other incumbent carriers, including in its pending arbitration with BellSouth before the Florida Public Service Commission.

FDN has invested millions of dollars in its own state-of-the-art switching facilities in order to deliver the highest quality of service to its customers. FDN is therefore unaccustomed to devoting its regulatory energies to expanding opportunities for resale, especially at a time where many in the industry have emphasized the benefits of encouraging facilities-based deployments. Ironically, however, the immediate availability of resold DSL service is vital to FDN's facilities-based strategy in the *voice* telecommunications market. At present, FDN is unable to offer facilities-based DSL services to approximately 90% of its customers because it has not yet been able to obtain unbundled access to BellSouth's last-mile Digital Loop Carrier (DLC) DSL facilities, and no DSL product is available for resale.[1] As customers look increasingly for integrated service providers that can satisfy all of their telecommunications

[1] FDN obtained the 90% DLC figure in discovery in its pending Florida arbitration with BellSouth. In its arbitration, FDN is seeking unbundled access to loops that include packet switching functionality where BellSouth has deployed packet switching functionality at remote terminals and where FDN is unable to collocate its own packet-switching facilities on the same terms and conditions as BellSouth. Similar requests have been pending in numerous states and before this Commission, some for more than two years. Meanwhile, the ILECs have been able to build a massive advantage in DSL deployment in areas served by DSL-capable Digital Loop Carriers while CLECs have not even been afforded a resale option to compete in these locations.

needs, FDN's inability to offer high-speed data services undermines its viability in the voice local exchange and interexchange markets. Perhaps even more damaging, if prospective FDN customers today are obtaining both voice and data services from an ILEC, they are unable to migrate their local exchange voice service to FDN's facilities-based voice service without having the ILEC disconnect their data service, even though the ILEC easily has the capability to continue to provide data service on the line. Given the initial hardships involved in having a DSL line installed, the customer is likely to lose interest in obtaining voice telephone services from FDN, even when FDN is able to offer superior pricing and service for voice services. If FDN could exercise its right to resell DSL services to these customers, the prospects for its facilities-based strategies in the voice market would be greatly improved.

No resale product exists today that is based upon SBC's retail rates for its DSL-based advanced telecommunications services. The ability of SBC and other ILECs to evade for more than three years their obligation to resell these services has stemmed in no small part from their success at framing the debate in inaccurate terms. The crucial issue is not whether SBC must offer a resale discount on the DSL transport service that its affiliate SBC Advanced Solutions, Inc. ("ASI") sells to ISPs,[2] or on the Internet information services that are included in the high-speed data service sold by its ISP affiliates such as Southwestern Bell Internet Services, Inc. ("SBIS").[3] Debates on these questions have served only to distract from what should be the core issue in this inquiry – the ability of competitive carriers to obtain, at rates calculated pursuant to Section 252(d)(3), the *telecommunications portion* of the ILEC's only core retail DSL offering, the DSL-based high-speed packet access service *sold by ILEC ISP affiliates* such as SBIS.[4]

Prior Commission rulings clearly establish that the DSL access lines included in SBIS' retail DSL-based high-speed access service are, when standing alone, telecommunications services.[5] It is also plainly evident that SBC's ISP affiliates, including SBIS, sell its DSL-based services at retail to customers who are not carriers,[6] and the D.C. Circuit's decision in *ASCENT* clearly establishes that the obligations of Section 251 apply to all telecommunications services offered by any SBC affiliate, including SBIS.[7] Therefore, the two-part test for determining

---

[2] Therefore, neither the exemption created by Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Second Report and Order* (November 9, 1999) ("*Second Report*") nor the Court of Appeals affirmation of it, *Association of Communications Enterprises v. FCC* 253 F.3d 29 (D.C. Cir. June 26, 2001) ("*ASCENT II*"), are relevant to the instant issue.

[3] FDN agrees with SBC that information services are not subject to Section 251. FDN seeks to resell only the DSL transport services that are provided by ILECs to their ISP affiliates, and does not seek to resell the enhanced ISP service that these affiliates may add to the DSL telecommunications service.

[4] Specifically, the rate should be calculated using the retail price for the SBIS' bundled service, less the portion of the rate attributable to Internet and other enhanced services, and less the avoided cost discount calculated pursuant to Section 252(d)(3). The service would be accessed by the CLEC or its ISP partner at SBC's DSL Connection Point, which is the same location where it hands off DSL traffic to its retail ISP affiliate and to unaffiliated ISPs.

[5] *See, e.g., Second Report* at ¶ 10.

[6] The comments of WorldCom, among others, clearly demonstrate the retail nature of SBC's product, illustrating SBC's provision of marketing, billing and customer care for end-users. SBC's own statements indicate that approximately 80% of its 1.2 million DSL lines are served by SBC's ISP affiliates, making them, taken together, the largest retail provider of DSL-based services in the nation. See WorldCom comments at 3 (citing SBC investor briefing).

[7] *Assn. of Comm. Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. January 9, 2001) ("*ASCENT*"); Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut, CC

whether a Section 251(c)(4) obligation is met, and SBC's arguments against DSL resale may stand *only* if it can justify an evasion of its resale obligation simply by its decision to sell the telecommunications service at retail only as part of a bundle with information services. [8]

I. SBC May Not Hide Behind the Contamination Doctrine to Evade its Section 251(c) Obligations

In its reply comments filed in this docket, SBC argues that the telecommunications service included in its retail DSL-based offering is exempt from common carrier regulation because the Commission in its *Report to Congress*[9] elected to forbear application of common carrier regulation on enhanced services providers that deliver a retail service via telecommunications. Although SBC does not describe its defense by name, it is relying on what the Commission has previously labeled in the *Computer Inquiries* as the "contamination doctrine." However, the Commission has previously determined that this doctrine cannot be relied upon by an ILEC to evade its obligations under the Act, finding that "application of the contamination doctrine to the BOCs would result in 'an improper policy result.'"[10] The Commission reasoned that:

> "application of the contamination theory to a facilities-based carrier . . . would allow circumvention of the Computer II and Computer III basic-enhanced framework . . . [and enable the carrier] to avoid Computer II and Computer III unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result."[11]

SBC's exercise of the contamination doctrine would lead to similar undesirable results in the DSL market. Relaxed regulation over independent ISPs does not have adverse consequences for consumers or competition because the Commission retains jurisdiction over the underlying common carrier services. By contrast, deregulation of the common carriers themselves could be expected to unleash anticompetitive pressures that would limit, or even eliminate, competition. Unlike non-carrier enhanced service providers, carriers engaged vertically in the enhanced services market have the power to restrain market forces by favoring their own enhanced services over those of competitors. Where a carrier such as SBC possess monopoly or near-monopoly power in the provision of last-mile access, its ability to suppress competition for enhanced services grows enormously. It would be bitterly ironic if the Commission's policy

---

Docket No. 01-100, *Memorandum Opinion and Order*, FCC 01-208 (rel. July 20, 2001) ("*Connecticut 271 Order*") at ¶ 32.

[8] SBC appears to offer at least two other feeble arguments. First, it argues that the interconnection agreement between ASI and Logix provides for a resale discount on advanced services. However, this agreement is limited to resale of the grandfathered services offered by SWBT and ASI, and does not include the only significant service, which is the retail service offered through SBIS. Second, SBC argues that the Commission cannot force it to offer a service at retail. However, SBC has already made the decision voluntarily to offer DSL-based services on a retail basis through SBIS and its other ISP affiliates.

[9] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998).

[10] *Independent Data Communications Manufacturers Association, Inc. and American Telephone and Telegraph Co. Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decision on the IDCMA Petition,* Memorandum Opinion and Order, 10 FCC Rcd 13717, 13723, at n. 73 (1995) (citing Computer III Notice, FCC 85-397, ¶ 32 (1985).

[11] Id. at ¶ 44.

designed to protect ISPs from the burdens of regulation were used by the most regulated of carriers to suppress, and ultimately destroy, competition in the very market the policy was designed to foster.

SBC's ability to suppress DSL competition through vertical anticompetitive tactics is much more than hypothetical. While ILEC ISP affiliates have traditionally held a single-digit percentage of the dial-up ISP market, they have leveraged their control of bottleneck facilities to amass approximately a three-quarter share of the DSL-based Internet services market. The total absence of a discounted DSL resale product is a significant accomplice to this rapid monopolization, because resale could have provided a safety valve to enable competitive entry where other means have failed or been delayed. CLEC facilities-based entry strategies have in many cases stumbled due to discriminatory provisioning, high UNE rates, and the slow pace of regulatory developments necessary for CLECs to secure access to loops served by Digital Loop Carriers, and these carriers, including FDN, are not able to turn to resale as an interim strategy while they litigate these issues in interconnection arbitrations and regulatory proceedings. Not coincidentally, as competition from facilities-based CLECs has diminished, ILECs have been imposing new rates and terms on their wholesale DSL services that threaten to force their unaffiliated ISP "partners" from the market. Many of SBC's ISP customers have complained vociferously of SBC's anticompetitive tactics in pleadings filed with this Commission and other regulatory agencies.[12] Unless other alternatives emerge, once broadband replaces dial-up as the primary means of Internet access, the ILECs will totally dominate not only DSL delivery but the ISP market as well.

While FDN hopes fervently that other alternatives will emerge, including facilities-based DSL deployments, the § 251(c)(4) resale requirement is the only self-executing option to protect the market from monopolization. The resale option should serve as a form of checks and balances in the DSL market, so that no matter what anticompetitive measures SBC attempts, there would always be a product available at the rates calculated by application of Section 251(d)(3) to the retail rates charged by SBC's ISP affiliates. No such product exists today, and as a result SBC's market power is very much unchecked and the market significantly out of balance.

Stripped of its contamination defense, SBC is clearly required to offer for resale the telecommunications portion of the retail DSL-based services offered by SBIS and other affiliates. SBC has effectively admitted as much by conceding that it must offer a resale discount on the small number of grandfathered retail services sold by ASI. The only material differences between these ASI retail lines and the telecommunications portion of SBIS' retail service are

---

[12] *California ISP Association, Inc. v. Pacific Bell Telephone Company, SBC Advanced Solutions, Inc et al.*, California Public Utility Commission Case No. 01-07-027; Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, and 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket No. 98-101, Initial Comments of the California ISP Association, Inc. (April 16, 2001); Petition for Investigation, Suspension and Rejection of SBC-ASI Tariff F.C.C. No. 1, *Petition and Application of the Texas Internet Service Providers Association* (September 13, 2001); It's Dirty Tricks—Big Time: Are Verizon and other Bells Cutting Off Rival ISPs?, *Business Week* (August 13, 2001) at 36. Regardless of whether the reasonableness of SBC's provisioning to these ISPs is within the scope of this proceeding, the Commission should not be lulled by SBC's attempt to excuse its non-compliance with § 251(c)(4) on the basis that its wholesale DSL product offers a reasonable lifeline to competitors. It certainly does not, but even if it did it would not relieve SBC of its Section 251 obligations.

SBC's reliance on the contamination doctrine to shield the latter from resale obligations, and the legal identity of the seller. Under the *ASCENT* decision, the telecommunications services of all in-region SBC/SBC affiliates are to be treated as the services of the ILEC SBC itself. SBC acknowledges that, "[a]s a result of *ASCENT I*, . . . the obligations of section 251(c) apply to the services provided by ASI in the same way that they would apply were those services provided by SWBT." SBC must therefore acknowledge that *ASCENT* requires similar application of Section 251 obligations to all SBC affiliates, including as SBIS.

Therefore, the Commission should refuse to apply the contamination doctrine to SBIS' retail DSL-based services, and should instead require SBC to offer the telecommunications portion of these services at the wholesale discount.

II. The Advanced Services Second Report and Order Does Not Excuse SBC's DSL Resale Obligations

SBC appears to contend that a DSL resale requirement would be inconsistent with the Commission's *Advanced Services Second Report and Order*. The *Second Report* held that the ILECs' sale of DSL transport to Internet Service Providers is a wholesale service not subject to § 251(c)(4).[13] This element of the *Second Report* is of no bearing on the instant issue, because FDN is seeking an avoided cost discount on the retail product sold by the ILECs' ISPs, and not on the ILEC's wholesale product sold to unaffiliated ISPs.[14] If SBC sold DSL only through unaffiliated ISPs, such as America Online, it would not have any DSL resale obligation under the Commission's existing rules. However, SBC also sells retail DSL-based services through SBIS, an affiliate which is itself subject to Section 251 pursuant to *ASCENT*. SBIS cannot invoke the *Second Report*'s wholesale defense, because it sells DSL to retail customers, and not to ISPs.

In fact, the *Second Report* helps to illustrate why SBC should be required to offer a resold discount based on SBIS' retail rates. When SBC sells its DSL service to unaffiliated ISPs, the ISP assumes the costs of billing, advertising and other retail costs. By contrast, SBC provides numerous retail functionalities to SBIS, including advertising, billing, and customer service functions. In some cases, the retail functions are performed nominally by the affiliate; in others, the retail activity is conducted directly by one of SBC's telecommunications companies. The *Second Report* found that when an ILEC offers DSL service to end-user customers and provides "marketing, billing, and customer care for the end-user," the services are being offered "directly to residential and business end-users" and are subject to the 251(c)(4) resale discount.[15]

The *Second Report* was intended to "encourage incumbents to offer advanced services to Internet Service Providers at the lowest possible price,"[16] but in reality the ILECs have misused the *Second Report* to attain monopoly power that allows them to levy *higher* charges on ISPs.

---

[13] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Second Report and Order* (November 9, 1999) ("*Second Report*").

[14] The *Second Report* appears to be based in part on a concern that if the ILECs were required to offer a wholesale discount on the wholesale rates that it charges to ISPs, it would never be able to offer the lowest possible price directly to an ISP because it would always be required to offer to CLECs a lower price. This concern is not implicated by CLEC efforts to obtain a discount based upon SBIS' retail price.

[15] *Second Report* at ¶ 6.

[16] *Second Report* at ¶ 20.

SBC in fact has raised its wholesale prices significantly in recent months, even while its own statements indicate that its provisioning costs are falling.[17] While SBIS may on paper "pay" the same rate for wholesale DSL as do unaffiliated ISPs, no genuine arms-length transaction exists, as SBC is simply moving money from one pocket to another. There is no self-enforcing mechanism to ensure that SBC's wholesale rate is one that has any real-world connection to SBC's retail rates, and accordingly no assurance that the rate would allow even the most efficient unaffiliated ISPs a meaningful opportunity to compete against SBIS. In fact, many ISPs have alleged that they cannot sustain viability in the DSL market under the ILECs' existing wholesale DSL rates. It is impossible for regulators to measure accurately the *true* proportion of retail costs that are borne by one ILEC affiliate vis-à-vis another. Therefore, the availability of a resold service at rates calculated pursuant to Section 252 offers the only independent safeguard to ensure that competitors can obtain DSL at rates that would allow them to compete with SBC's retail offering.

Implementation of Section 251(c)(4) in the manner requested herein will not preclude SBC from offering low rates to ISPs, since no wholesale discount would be available on the ISP rate, pursuant to the Second Report. In fact, once wholesale discount rates for DSL are established through state proceedings, ILECs would likely adjust their wholesale DSL rates, if necessary, to ensure that the rates are not substantially higher than the new rate offered to CLECs. Otherwise, ISPs would likely turn *en masse* to CLECs for service based on the resold product. The new rates would reflect neutral application of Section 252 to SBC's actual retail rates, rather than SBC's unilateral pricing decision designed to suit its own, often anticompetitive, purposes. Therefore, the *Second Report's* objective of encouraging the lowest possible DSL price for ISPs will be realized only if the ILECs are prevented from relying upon the *Second Report* to excuse their refusal to offer DSL telecommunications services at a wholesale discount.

III. SBC Should be Prohibited from Imposing Unreasonable Restrictions on Resale

Finally, the relief requested herein will be of limited value if the Commission does not prohibit SBC from refusing to supply resold DSL services except on lines where SBC is the retail voice carrier and, as required by the recent Verizon 271 orders, where a CLEC provides resold voice services. There is no reasonable basis for an ILEC to refuse to allow a resold ADSL service to be provided on lines served by CLECs via UNE loops.[18] In its *Connecticut 271 Order*, the Commission found that "Verizon's policy of limiting resale of DSL services to situations where Verizon is the voice provider severely hinders the ability of other carriers to compete. ... This result is clearly contrary to the pro-competitive Congressional intent underlying section 251(c)(4)."[19] Regrettably, notwithstanding its finding of anticompetitive behavior "clearly contrary" to the Act, the Commission has so far stopped short of applying its findings through a requirement that ILECs offer resold DSL to CLECs that are using UNE loops. Instead, the

---

[17] *See* SBC Investor Report, 2nd Quarter 2001, http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf, at 5 (describing 25% reduction in DSL acquisition costs). Verizon and BellSouth also raised their wholesale DSL rates tariffed with the Commission by approximately 15% in recent months.

[18] This determination should be made based on standards of reasonableness set forth in Sections 201 and 251. The Commission's line sharing rules are not implicated because line sharing is a UNE, while the instant issue is related to SBC's obligations with respect to its retail services, rather than UNEs.

[19] *Connecticut 271 Order* at ¶ 32.

Commission has stated that it must first address "significant additional issues" related to such a requirement, but has not to FDN's knowledge specified the nature of these issues. Given the patently anticompetitive impact of this ILEC policy on the voice and data markets, FDN urges the Commission above all to refrain from making and findings that might in any way legitimize the ILECs' anticompetitive practice. The Commission either should expand its holding in the *Connecticut 271 Order* to CLEC UNE lines or should solicit public comments in a separate proceeding so that it may address this important matter as soon as possible.

* * * * *

For the reasons set forth herein, the Commission should refuse to approve SBC's Application until SBC submits to application of Section 251(c)(4) to the telecommunications portion of SBIS' DSL-based access service. At a minimum, the Commission should clearly establish a new standard for DSL resale by which subsequent applications, including BellSouth's application for Georgia and Louisiana, would be judged.

Respectfully submitted,

Michael C. Sloan
Paul B. Hudson
Swidler Berlin Shereff Friedman, LLP
3000 K St. N.W., Suite 300
Washington, DC 20007
Telephone: (202) 945-6940
Counsel for Florida Digital Network, Inc.

cc: Kyle Dixon
Jordan Goldstein
Matthew Brill
Sam Feder
Dorothy Attwood
Jeffrey Carlisle
Michelle Carey
Claudia Pabo
Jane Jackson
Rich Lerner
Scott Bergmann
William Dever
Kim Cook
Linda Kinney
Nick Bourne
Debra Weiner
Paula Silberthau
Qualex International